

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RICHARD BLANCHARD, an individual,) 2:11-cv-01127-ECR-PAL
8 Plaintiff,)
9 vs.)
10 JP MORGAN CHASE BANK; US BANK)
11 N.A.; QUALITY LOAN SERVICES)
CORPORATION; MERSCORP, INC., a)
12 Virginia Corporation, MORTGAGE)
ELECTRONIC REGISTRATION SYSTEMS,)
13 INC., a subsidiary of MERSCORP,)
INC., a Delaware corporation; DOES)
14 I individuals 1-100, inclusive;)
and ROES Corporations 1 to 30,)
15 inclusive,)
16 Defendants.)
17)

Amended Order

Plaintiff is a homeowner alleging predatory lending practices by Defendants. Now pending are a Motion for Preliminary Injunction (#1-4) filed by Plaintiff, a Motion to Dismiss (#7) filed by Defendant Quality Loan Services Corporation, a Motion to Remand (#12) filed by Plaintiff, and a Motion for Declaratory Relief (#30) filed by Plaintiff.

I. Background

Plaintiff is the owner of the property at 2503 Vegas Vic
27 Street, Henderson, Nevada ("Subject Property"). (Compl. at 4 (#1-
28

1 2).) The Subject Property was financed through the execution of a
 2 note and deed of trust promising to repay the sum of \$360,000.00 in
 3 monthly installments to the Mortgage Store of Denver. (Deed of
 4 Trust¹ (#7-1).) The deed of trust was recorded on September 8, 2006
 5 in the official records of Clark County. (*Id.*) On September 26,
 6 2006, an assignment of the deed of trust was recorded by The
 7 Mortgage Store of Denver in favor of JP Morgan Chase Bank, N.A...
 8 (Sep. 26, 2006 Assignment (#7-2).)

9 On March 30, 2010, Plaintiff filed a voluntary Chapter 7
 10 bankruptcy petition. (Bankruptcy Docket (#7-3).) An order
 11 terminating the automatic stay with respect to the Subject Property
 12 was filed on October 29, 2010. (*Id.*) Plaintiff's Chapter 7 case
 13 was closed on December 8, 2011.

14 On November 15, 2010, an assignment of the deed of trust was
 15 recorded by JP Morgan Chase Bank, N.A. in favor of Mortgage
 16 Electronic Registration Systems, Inc. ("MERS") as nominee for
 17 Federal National Mortgage Association ("Fannie Mae"). (Nov. 15, 2010
 18 Assignment (#7-4).) On February 4, 2011, an assignment of the deed
 19 of trust was recorded by MERS as nominee for Fannie Mae in favor of
 20 Fannie Mae. (Feb 4, 2011 Assignment (#7-5).)

21 On February 14, 2011, a substitution of trustee was recorded by
 22 Fannie Mae and appointed Quality Loan Service Corporation
 23 ("Quality") as the foreclosure trustee. (Substitution of Trustee

24
 25 ¹ Defendants request judicial notice of the deed of trust,
 26 substitution of trustee, election to sell, and other such exhibits.
 27 Under Federal Rule of Evidence 201, a court may judicially notice
 matters of public record. Disabled Rights Action Comm. v. Las Vegas
Events, Inc., 375 F.3d 861, 866 n. 1 (9th Cir 2004). Therefore, we
 take judicial notice of these public records.

1 (#7-6).) Quality then recorded a notice of default and election to
2 sell on February 18, 2011. (Notice of Default (#7-7).) On June 2,
3 2011, Quality recorded a notice of sale, scheduling the Subject
4 Property for auction on June 23, 2011. (Notice of Sale (#7-8).) The
5 sale was postponed.

6 On June 9, 2011, Plaintiff filed this action in state court.
7 On June 13, 2011, Plaintiff filed a Motion for Preliminary
8 Injunction (#1-4). On June 30, 2011, Quality Loan Service
9 Corporation filed an opposition (#1-6) to Plaintiff's Motion for
10 Preliminary Injunction (#1-4). MERS and US Bank, N.A. joined in the
11 opposition (#2, 29). On July 7, 2011, Defendants removed the
12 action to this court. (Pet. for Removal (#1).)

13 On July 16, 2011, Quality filed a Motion to Dismiss (#7). On
14 July 26, 2011, Plaintiff filed an opposition (#11) to the Motion to
15 Dismiss (#7). On July 27, 2011, Quality replied (#14). MERS and US
16 Bank, N.A. joined (#10, 14, 22) in the motion and reply.

17 On July 26, 2011, Plaintiff filed a Motion to Remand (#12). On
18 August 9, 2011, MERS filed an opposition (#17) to the Motion to
19 Remand (#12). Quality Loan Services Corporation and U.S. Bank, N.A.
20 joined (#19, 21) in the opposition (#17). On August 18, 2011,
21 Plaintiff replied (#18).

22 On December 1, 2011, Plaintiff filed a Motion for Declaratory
23 Relief (#30). On December 12, 2011, Quality filed its opposition
24 (#32), and on December 14, 2011, MERS filed its opposition (#33). On
25 January 3, 2012, Plaintiff replied (#36).

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1 **II. Motion for Preliminary Injunction (#1-4)**

2 Plaintiff filed a motion for a preliminary injunction (#1-4) in
3 state court, before the action was removed to this Court. Plaintiff
4 requests that the Court issue a preliminary injunction allowing
5 Plaintiff to stay in the Subject Property. Plaintiff's motion (#1-
6 4) states only that he "alleges that they [sic] have a reasonable
7 probability of success on the merits of the case for which
8 compensatory damages are not available and irreparable harm will be
9 suffered should the injunction not be issued."

10 A preliminary injunction to preserve the status quo is
11 available if it shown that the party seeking it "enjoys a reasonable
12 probability of success on the merits" and that the opposing party's
13 conduct, if allowed to continue, "will result in irreparable harm
14 for which compensatory damage is an inadequate remedy." Dixon v.
15 Thatcher, 742 P.2d 1029, 1029 (Nev. 1987). In foreclosure cases,
16 because "real property and its attributes are considered unique and
17 loss of real property rights generally results in irreparable harm"
18 the second factor of a requisite for a preliminary injunction is
19 often satisfied. Id. at 1030. However, as discussed in the motion
20 to dismiss, Plaintiff has failed to show a reasonable probability of
21 success on the merits. Plaintiff has plainly failed to make any
22 argument in his motion (#1-4), and the allegations in the complaint
23 are largely duplicative of foreclosure claims that this Court has
24 repeatedly found deficient. Therefore, Plaintiff's Motion for
25 Preliminary Injunction (#1-4) must be denied.

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III. Motion to Remand (#12)

2 Plaintiff filed a motion to remand (#12), requesting that this
3 Court remand the action to state court. Plaintiff focuses on
4 federal question jurisdiction, which is not the basis on which
5 Defendants removed the action. Plaintiff is alleged to be a
6 resident of Nevada, and Defendants are California, Delaware, and
7 Virginia corporations. The action is based on Plaintiff's execution
8 of a promissory note in the amount of \$360,000.00 and a deed of
9 trust secured by property. Because the parties are diverse, and the
10 amount in controversy exceeds \$75,000, we must deny Plaintiff's
11 motion (#12).²

IV. Motion to Dismiss (#7)

A. Legal Standard

15 A motion to dismiss under Federal Rule of Civil Procedure
16 12(b)(6) will only be granted if the complaint fails to "state a
17 claim to relief that is plausible on its face." Bell Atl. Corp. v.
18 Twombly, 550 U.S. 544, 570 (2007); see also Ashcroft v. Iqbal, 129
19 S. Ct. 1937, 1953 (2009) (clarifying that Twombly applies to
20 pleadings in "all civil actions"). On a motion to dismiss, except
21 where a heightened pleading standard applies, "we presum[e] that
22 general allegations embrace those specific facts that are necessary
23 to support the claim." Lujan v. Defenders of Wildlife, 504 U.S.
24 555, 561 (1992) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S.

26 ² Nor is there merit to Plaintiff's argument about lack of
27 joinder of all Defendants in the removal. All defendants who were
served at the time of removal joined in the removal, or have since
filed joinders.

1 871, 889 (1990)) (alteration in original); see also Erickson v.
 2 Pardus, 551 U.S. 89, 93 (2007) (noting that “[s]pecific facts are
 3 not necessary; the statement need only give the defendant fair
 4 notice of what the . . . claim is and the grounds upon which it
 5 rests.”) (internal quotation marks omitted). Moreover, “[a]ll
 6 allegations of material fact in the complaint are taken as true and
 7 construed in the light most favorable to the non-moving party.” In
 8 re Stac Elecs. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996)
 9 (citation omitted).

10 Although courts generally assume the facts alleged are true,
 11 courts do not “assume the truth of legal conclusions merely because
 12 they are cast in the form of factual allegations.” W. Mining
 13 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Accordingly,
 14 “[c]onclusory allegations and unwarranted inferences are
 15 insufficient to defeat a motion to dismiss.” In re Stac Elecs., 89
 16 F.3d at 1403 (citation omitted).

17 Review on a motion pursuant to Fed. R. Civ. P. 12(b)(6) is
 18 normally limited to the complaint itself. See Lee v. City of L.A.,
 19 250 F.3d 668, 688 (9th Cir. 2001). If the district court relies on
 20 materials outside the pleadings in making its ruling, it must treat
 21 the motion to dismiss as one for summary judgment and give the non-
 22 moving party an opportunity to respond. Fed. R. Civ. P. 12(d);
 23 see United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003). “A
 24 court may, however, consider certain materials – documents attached
 25 to the complaint, documents incorporated by reference in the
 26 complaint, or matters of judicial notice – without converting the

1 motion to dismiss into a motion for summary judgment." Ritchie, 342
2 F.3d at 908.

3 If documents are physically attached to the complaint, then a
4 court may consider them if their "authenticity is not contested" and
5 "the plaintiff's complaint necessarily relies on them." Lee, 250
6 F.3d at 688 (citation, internal quotations, and ellipsis omitted).
7 A court may also treat certain documents as incorporated by
8 reference into the plaintiff's complaint if the complaint "refers
9 extensively to the document or the document forms the basis of the
10 plaintiff's claim." Ritchie, 342 F.3d at 908. Finally, if
11 adjudicative facts or matters of public record meet the requirements
12 of Fed. R. Evid. 201, a court may judicially notice them in deciding
13 a motion to dismiss. Id. at 909; see FED. R. EVID. 201(b) ("A
14 judicially noticed fact must be one not subject to reasonable
15 dispute in that it is either (1) generally known within the
16 territorial jurisdiction of the trial court or (2) capable of
17 accurate and ready determination by resort to sources whose accuracy
18 cannot reasonably be questioned.").

19 **B. Discussion**

20 1. Plaintiff's Standing

21 Defendants contend that Plaintiff lacks standing to bring
22 several of his claims due to bankruptcy. Plaintiff filed for
23 Chapter 7 bankruptcy on March 30, 2010, and then filed this action
24 in state court on June 9, 2011. All of Plaintiff's claims, with the
25 exception of the third claim for wrongful foreclosure, the eighth
26 claim for quiet title, the tenth claim for injunctive relief, and
27 the fourteenth claim for negligent infliction of emotional distress,

1 are based on allegations of predatory lending occurring at the time
 2 the loan was originated. The loan at issue in those claims
 3 originated prior to the filing of the bankruptcy petition.

4 Upon the commencement of a bankruptcy case, a bankruptcy estate
 5 was created. 11 U.S.C. § 541(a). The bankruptcy estate includes
 6 lawsuits or causes of action that accrued to the debtor prior to the
 7 petition date. See, e.g., In re Lopez, No. CC-11-1274-MkCaPa, 2012
 8 WL 603675, at *3 (B.A.P. 9th Cir. Feb. 3, 2012); Matter of Wischan,
 9 77 F.3d 875, 877 (5th Cir. 1996). The bankruptcy trustee has the
 10 authority and duty to "collect and reduce to money the property of
 11 the estate," including Plaintiff's claims. 11 U.S.C. § 704(a)(1).
 12 Unless and until the trustee abandons the claims, they remain
 13 property of the estate. 11 U.S.C. § 554(c), (d). It is undisputed
 14 that the trustee never formally abandoned the claims in this action
 15 after notice and a hearing. However, any property scheduled but not
 16 otherwise administered at the time of the closing of a case is
 17 abandoned to the debtor. 11 U.S.C. § 554(c). Because the parties
 18 have not considered whether the claims in this case originating
 19 before the bankruptcy petition was filed have been abandoned, or
 20 whether Plaintiff otherwise has standing to pursue those claims, we
 21 deny Defendants' request to dismiss those claims due to lack of
 22 standing.³

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 25 ³ Defendants also make a summary argument that Plaintiff's
 26 prepetition claims lack any merit based on previous decisions by this
 27 Court. Because Defendants have not addressed each claim or settled
 the issue of standing post-bankruptcy, we decline to dismiss the
 claims in their entirety at this time, but shall grant Defendants
 additional time in which to file a second motion to dismiss.

2. Plaintiff's Non-Prepetition Claims

2 Defendants also seek to dismiss Plaintiff's non-prepetition
3 claims on the basis that they fail on the merits.

a. Third Cause of Action for Wrongful Foreclosure

Plaintiff alleges in his third cause of action for wrongful foreclosure that Defendants failed to review Plaintiff for a HAMP loan modification. “[L]oan modifications are not an entitlement, but are linked to decisions that result in profits to taxpayers. Congress did not intend to mandate loan modifications.” Williams v. Geithner, No. 09-1959 ADM/JJG, 2009 WL 3757380, at *6 (D. Minn. Nov. 9, 2009). Plaintiff is unable to demonstrate that such an allegation forms the basis of a triable claim.

b. Seventh Cause of Action for Unjust Enrichment

14 Plaintiff's claim for unjust enrichment fails because there is
15 an express written agreement—the deed of trust—that governs in this
16 case. Nevada law does not permit a claim for unjust enrichment
17 where an express written contract governs the transaction at issue.
18 Leasepartners Corp. v. Robert L. Brooks Trust, 942 P.2d 182, 187
19 (Nev. 1997) (per curiam). Thus, Plaintiff's seventh cause of action
20 must be dismissed without leave to amend.

c. Eighth Cause of Action to Quiet Title

22 In Nevada, a quiet title action may be brought "by any person
23 against another whom claims an estate or interest in real property,
24 adverse to the person bringing the action, for the purpose of
25 determining such adverse claim." NEV. REV. STAT. § 40.010. "In a
26 quiet title action, the burden of proof rests with the plaintiff to
27 prove good title in himself." Brelian v. Preferred Equities Corp.,

1 918 P.2d 314, 318 (Nev. 1996). "Additionally, an action to quiet
 2 title requires a plaintiff to allege that she has paid any debt owed
 3 on the property." Lalwani v. Wells Fargo Bank, N.A., No. 2-11-cv-
 4 00084, 2011 WL 4574388 at *3 (D. Nev. Sep. 30, 2011) (citing
 5 Ferguson v. Avelo Mortg., LLC, No. B223447, 2011 WL 2139143 at *2
 6 (Cal. App. 2d June 1, 2011)). Plaintiff has failed to allege that he
 7 is not in breach of the loan agreement. While Plaintiff does not
 8 expressly admit to being in default on the loan, the complaint, read
 9 as a whole, and taking all allegations in favor of Plaintiff, does
 10 not show even the barest hint of a dispute over whether Plaintiff
 11 was in default. Rather, Plaintiff is challenging the procedure with
 12 which foreclosure was initiated against him, not that the loan was
 13 not in default. Accordingly, the quiet title claim must be
 14 dismissed without leave to amend.

15 d. Tenth Cause of Action for Injunctive Relief

16 Injunctive relief is a remedy, not a separate cause of action.
 17 See, e.g., In re Wal-Mart Wage and Hour Employment Practices Litig.,
 18 490 F.Supp.2d 1091, 1130 (D. Nev. 2007). As such, Plaintiff's claim
 19 for injunctive relief shall be dismissed with the understanding that
 20 if the action survives, injunctive relief may be granted as a remedy
 21 upon a showing that such relief would be appropriate.

22 e. Fourteenth Cause of Action for Negligent Infliction of
 23 Emotional Distress

24 In order to establish a claim for negligent infliction of
 25 emotional distress, Plaintiff needs to show "extreme and outrageous
 26 conduct with either the intention of, or reckless disregard for,
 27 causing emotional distress." State v. Eighth Judicial Dist. Court

1 ex rel. Cnty. of Clark, 42 P.3d 233, 241 (Nev. 2002). Extreme and
2 outrageous conduct is that which is "'outside all possible bounds of
3 decency' and is regarded as 'utterly intolerable in a civilized
4 community.'" Maduike v. Agency Rent-A-Car, 953 P.2d 24, 26 (Nev.
5 1998) (citations omitted). Plaintiff's complaint does not do more
6 than quote the legal elements of such a cause of action, nor is any
7 allegation contained in the complaint indicative of the type of
8 extreme and outrageous conduct necessary to sustain such a claim.
9 Therefore, Plaintiff's negligent infliction of emotional distress
10 claim must be dismissed without leave to amend.

11

12 **V. Motion for Declaratory Relief (#30)**

13 Plaintiff filed a "Motion for Declaratory Relief to Determine
14 Defendant's True Standing to Collect, Calculations of Payments
15 Demanded by Defendants Pursuant to Notice of Default" (#30). In his
16 Motion (#30), Plaintiff requests that we grant declaratory relief
17 "to determine if the variable numerical/monetary figures for
18 required payments entered pursuant to statements." (Mot. for
19 Declaratory Relief at 1 (#30).) Plaintiff cites various provisions
20 of the tax code that do not apply in this mortgage case. The trust
21 that those provisions refer to are not related to the deed of trust
22 in this case. Furthermore, the sufficiency of Plaintiff's claims
23 are under consideration, and Plaintiff is not entitled to
24 declaratory relief at this time.

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VI. Conclusion

2 **IT IS, THEREFORE, HEREBY ORDERED** Plaintiff's Motion for
3 Preliminary Injunction (#1-4) is **DENIED**.

4 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Remand (#12)
5 is **DENIED**.

6 **IT IS FURTHER ORDERED** that Quality's Motion to Dismiss (#7), in
7 which US Bank, N.A. and MERS join, is **GRANTED IN PART AND DENIED IN**
8 **PART:** Plaintiff's third cause of action for wrongful foreclosure,
9 seventh cause of action for unjust enrichment, eighth cause of
10 action to quiet title, tenth cause of action for injunctive relief,
11 and fourteenth cause of action for negligent infliction of emotional
12 distress are **DISMISSED WITH PREJUDICE** against all Defendants, and
13 Plaintiff's remaining claims shall not be dismissed.

14 **IT IS FURTHER ORDERED** that Defendants shall have an additional
15 twenty-eight (28) days within which to file a second motion to
16 dismiss addressing Plaintiff's standing to bring the prepetition
17 claims now that his bankruptcy case has been closed, and the merits
18 of those claims, if appropriate.

19 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Declaratory
20 Relief (#30) is **DENIED**.

23 | DATED: March 26, 2012.

Edward C. Reed.
UNITED STATES DISTRICT JUDGE